UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

RALPH H. DRAKE, JR., Chapter 7

Debtor. Case No.: 01-14993

JOHN W. TABNER, WILLIAM F. RYAN, JR., and WILLIAM J. KENIRY, d/b/a TABNER, RYAN & KENIRY,

Plaintiff, Adv. Pro. No.: 02-90054

v.

RALPH H. DRAKE, JR.,

Defendant.

WILLIAM M. McCARTHY, as Chapter 7 Trustee to the bankruptcy estate of RALPH H. DRAKE, JR.,

Plaintiff, Adv. Pro. No.: 02-90281

v.

RALPH H. DRAKE, JR.,

Defendant.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

JOINT MEMORANDUM-DECISION AND ORDER ON DEFENDANT/DEBTOR'S MOTION

FOR A NEW TRIAL PURSUANT TO FED. R. BANKR. P. 9023 OR, IN THE ALTERNATIVE, AMENDED FINDINGS OF FACT PURSUANT TO FED. R. BANKR. P. 7052

Before the court is the motion of the Defendant/Debtor ("Debtor") for a new trial in the consolidated adversary proceedings pursuant to Fed. R. Bankr. P. 9023 or, in the alternative, amended findings of fact pursuant to Fed. R. Bankr. P. 7052. The motion is directed at this court's Joint Memorandum, Decision & Order ("Decision") dated February 18, 2004, denying the Debtor's discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A), (a)(2)(B) and (a)(4)(A). The Decision was issued after a joint trial in the adversary proceedings commenced by the Chapter 7 trustee ("Trustee") and judgment creditor Tabner, Ryan and Keniry ("Tabner"). Familiarity with the Decision is presumed. The motion is considered in conjunction with formal opposition from the Trustee.[1] (Adv. Pro. No. 02-90281; Docket No. 24) [hereinafter "Trustee's Opposition"]. A hearing on this matter was held on March 25, 2004; Tabner's counsel appeared in opposition on the record, but no formal opposition was filed on behalf of Tabner.

After considering the weight of the evidence, the court found the Debtor: (1) transferred property with the actual intent to hinder, delay, or defraud a creditor or an officer of the estate (Decision at 26); (2) fraudulently concealed assets within one year of his bankruptcy filing (Decision at 28); and (3) knowingly and fraudulently made false oaths in connection with his bankruptcy case (Decision at 31). Conversely, the court did not find for the Plaintiffs on their §§ 727(a)(3) and (a)(5) claims, which were dismissed.

The gravamen of the Debtor's motion is that the court was unfairly prejudiced by its alleged improper evidentiary ruling to allow Tabner's counsel to introduce prior criminal proceedings against the Debtor,

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[1] The Trustee's Opposition focuses extensively on the legal standard for reconsideration pursuant to Fed. R. Civ. P. 59(e). However, the court construes the motion as a one for a new trial under Fed. R. Civ. P. 59(a), rather than a motion to vacate, alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e). Notwithstanding, the court would deny the motion even if it were to be construed as one brought under the latter Rule, as the Debtor has not met the standard applicable to such a motion. *See In re Morales*, 25 F. Supp. 2d 369, 372 (S.D.N.Y. 1998) (citing *Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782 (2d Cir. 1983) (a party seeking reconsideration must demonstrate an intervening change in controlling law, clear error, manifest injustice, or newly discovered evidence); *Schrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked and may reasonably alter the conclusion reached by the court).

thereby depriving the Debtor of the right to a fair trial. The Debtor is convinced that the court resolved various factual disputes in favor of the Plaintiffs primarily because the Debtor's credibility was tainted by the introduction of the criminal proceedings. In support of his request for a new trial, the Debtor states, "[A]ll determinations made by the Court involving disputed factual issues were at least in part, influenced by the Court's erroneous perception that Debtor was unable to tell the truth. Debtor should, therefore, be granted a new trial so that he might obtain a determination of the issues involving his discharge in a light which has not been affected by the improper placement of prejudicial material before the trier of fact." (Motion at 5.) Alternatively, the Debtor asks the court to revisit and amend certain findings of fact and conclusions of law supporting denial of the Debtor's discharge.

Fed. R. Civ. P. 59(a), made applicable to this proceeding by Fed. R. Bankr. P. 9023, provides in part:

> **(a) Grounds**. A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2)in an action tried without a jury, for any of the reasons for which new trials have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend finding of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.

Fed. R. Civ. P. 52, made applicable to this proceeding by Fed. R. Bankr. P. 7052, provides in part:

> **(a) Effect**. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.
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> **(b) Amendment**. [T]he court may amend its findings – or make additional findings – and may amend the judgment accordingly. [A party's] motion may accompany a motion for a new trial under Rule 59.

"Rule 59(a) complements Rule 52. When the trial record before the court in a non-jury case is infected with 'manifest errors of law or fact,' the court may order a new trial on some or all of the issues in the case." *United States Gypsum Co. v. Schiavo Bros., Inc.*, 668 F.2d 172, 180 (3d Cir. 1981) (citations omitted). However, "a trial court should be most reluctant to set aside that which it has previously decided unless convinced that it was based on a mistake of fact or clear error of law, or that refusal to revisit the earlier

decision would work a manifest injustice." *LiButti v. United States,* 178 F.3d 114, 118 (2d Cir. 1999). There are three grounds for granting a new trial under Rule 59(a)(2): (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence. *In re Lionel Corp.*, 29 B.R. 694, 695 (Bankr. S.D.N.Y. 1983). A new trial must be ordered if necessary to cure the prejudice resulting from errors or oversight. *Gypsum,* 668 F.2d at 180. Where a new trial is not ordered, however, "the trial record must support whatever additional findings of fact or conclusions of law a party seeks under Rule 52(b) or it is certainly not entitled to them." *Id.*

The Debtor is not claiming there is any new information or evidence to show that cause exists for a new trial or modification of the court's prior findings and conclusions. (Debtor's Reply ¶ 1.) Rather, the Debtor's accusations of error center around the sole allegation that the court improperly allowed testimony relating to the Debtor's criminal proceedings and, therefore, misapprehended the facts of the case. The Debtor's position is summarized as follows: "To . . . permit the use of [the criminal] proceedings as evidence of the credibility of the Debtor and to reach conclusions of law and fact based upon such improper evidence is a clear error that has had the net effect of denying Debtor a fair hearing on the issues before the Bankruptcy Court." (*Id.* ¶ 7.)

This argument, however, wholly ignores the ultimate conclusion of the court: "[T]he court declines to consider the Debtor's testimony [regarding the criminal proceedings] as it relates to his entitlement to discharge." (Decision at 22.) The Decision plainly states that the Debtor's prior criminal indictment, even if convicted, "provides little, if any, probative value to the underlying bankruptcy causes of action." (*Id.* at 21.) Based on the Decision, the Debtor cannot show that the court overlooked the prejudicial effect of counsel's introduction of the criminal proceedings. Moreover, any inference that the court overemphasized the criminal proceedings is also negated by the Decision. The Debtor's general allegations of prejudice are insufficient to support a new trial.

Moreover, the Debtor's request for a new trial is not aided by his disagreement with the court's analysis of the relevant evidentiary rules. The Debtor nonetheless obtained the desired result: the court ruled

that the Debtor's criminal history and correlative testimony were inadmissible in this proceeding. Following a discussion of the relevant evidentiary rules, the court made clear that the Decision was not premised on the Debtor's criminal history. (Decision at 21, 22.)

The Debtor apparently seeks to relitigate the issue of fraud, but "[a] losing party's desire to relitigate an issue in the hopes that the trial court will change its mind does not constitute a proper ground for granting a new trial." *In re Lionel*, 29 B.R. at 696. The court has considered all of the minutiae of circumstances presented by the Debtor in support of this motion, but it remains persuaded that the Decision fairly reflects the documentary evidence and testimony offered at trial. Because the many incidents of fraud committed by the Debtor are contained in the Decision, the court need not repeat them here.

Alternatively, the Debtor seeks amendment of the facts including, but not limited to: (1) the Debtor's desire to dismiss rather than convert his Chapter 13 case; (2) details of the Debtor's pre-bankruptcy deposition which relate to disclosure of assets; and (3) value of the Debtor's residence at the time of filing. With respect to each of these issues, the Debtor's testimony was accurately reported in the lengthy recitation of facts included in the Decision. In fact, the court noted that the: (1) second conversion to Chapter 13 was over the Debtor's opposition (Decision at 3); (2) Debtor testified at a pre-bankruptcy deposition (Decision at 8); and (3) value of his residence was derived from a full market assessment provided by the Debtor (Decision at 7). Contrary to the Debtor's assertion, the court does not find that there are material factual omissions in the Decision. Facts that are not germane to the claims asserted are not included in the Decision, but this does not mean that the Debtor is entitled to an amendment. Importantly, even if the court were to find certain testimony pinpointed by the Debtor's counsel to be credible, it would not alter the Decision because of the plethora of bad acts committed by the Debtor. The Plaintiffs presented overwhelming evidence that proved the Debtor had, at best, taken a "fast and loose" approach with respect to both assets and his overall financial state. (Decision at 22.) Such an approach cannot be rewarded with a discharge.

Finally, the Debtor similarly asks the court to amend its conclusions that the Debtor: (1) offered conflicting testimony regarding cash on hand; (2) possessed a counterclaim against Cammarota; (3) received

undisclosed income prior to his bankruptcy filing; (4) failed to disclose an accurate value for his residence; (5) could not recall the exact amount borrowed from his mother as consideration for a mortgage; and (6) fraudulently transferred the Sand Creek Road property. The Debtor's request for amended conclusions is also, in part, based on general allegations of prejudice; the Debtor has not provided any new evidence or directed the court's attention to manifest errors that require amendment of its prior conclusions. Instead, the Debtor challenges the court's determination of the Debtor's credibility and its interpretation of the testimony and evidence adduced at trial. A careful review of the record, however, reveals that the terms "honest but unfortunate" cannot be attributed to the Debtor under the circumstances of this case. Thus, the court finds no basis for amending the Decision.

For the reasons stated, the Debtor's motion for a new trial or, alternatively, for amended findings of fact and conclusions of law is denied.

It is SO ORDERED.

Dated: May 12, 2004
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge